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Cultural heritage, international criminal law and protection of human rights between history and jurisprudence

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CULTURAL HERITAGE, INTERNATIONAL CRIMINAL LAW AND PROTECTION OF HUMAN RIGHTS BETWEEN HISTORY AND JURISPRUDENCE

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Abstract: The protection of cultural heritage in our days is a subject of international criminal law given that the first sentences by international courts that paved the way for inserting asset protection as an autonomous and ad hoc crime into an international statute were those of the International Criminal Court (ICC). The polymorphism of protection needs is connected to the versatility which includes every legal asset to be protected and which arises from both domestic and international law. The cultural asset is characterized by both certain and generic attributes, such as immaterial or tangible, movable or immovable. The collateral damage caused during armed conflicts, the dangers that arise, the destruction of the illicit trafficking of works of art as part of what is called cultural heritage is an issue that requires the preservation of intangible cultural heritage. The destruction and impoverishment of cultural heritage also opens the way to punishment given the individual responsibility of the subject who destroys a protected

asset, simultaneously highlighting the anthropocentric nature of the interest thus read. This is the panorama of the present paper which is based both on the doctrine and on the jurisprudence of the international courts of recent years helping us understand what kind of protection we need and what cultural protection means.

Key words: cultural heritage, ICTY, ICC, Nuremberg, ECCC, ECtHR, ECHR, STL, international responsibility, cultural genocide, cultural cleansing.

Introduction[1]

Studying the Draft Policy of the Prosecutor of ICC, which dates back to 2021, we take into consideration that:

"(…) the Court may rely on applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict (article 21 of the Statute). Although the crimes set out in the Statute should be interpreted first and foremost on their own terms, a number of principles and rules of international law may assist in relation to cultural heritage, including those set out in the 1954 Hague Convention, the 1954 First Protocol, the 1972 World Heritage Convention, the 1999 Second Protocol, the 2003 UNESCO Convention, and in the core instruments of international humanitarian law (particularly the 1899 and 1907 Hague Regulations, the 1949 Geneva Conventions, and the 1977 Additional Protocols) (…) the Office will: (i) Apply and interpret the Statute consistently with the sources of law set out in article 21, including those relating to cultural heritage and to internationally recognised human rights; (ii) Consider and evaluate the impact of crimes against or affecting cultural heritage on the exercise of internationally recognised human rights; (iii) Seek to gain insight into crimes against or affecting various forms of cultural

[1]I would like to thank for the comments the reviewers and especially of prof. D. Liakopoulos for his helpful comments on an earlier draft of this article.

heritage, including any links between them, and how they may, individually or collectively, play a role in complex forms of criminality; and (iv) Undertake its work in a manner that is culturally sensitive and respects the role that cultural heritage plays for both local communities and humanity, provided that such cultural heritage is consistent with internationally recognised human rights (…)"[2].

Reading this context, the need arises for an in-depth study of the jurisprudence of international criminal courts in the sector of cultural policy. Is this a new or old story? What is the purpose of this protection? What is the difference between cultural protection and war, as well as between cultural heritage and individual responsibility? Is the protection of culture or of human rights preferred? What is the punishment that most interests international organizations and tribunals, that of peace or war crimes? These are some of the questions and topics that are open and always under discussion.

From Nuremberg dates the history of the crimes committed by the Nazi forces, now called individual crimes. Recently we have come to talk about the criminal liability of the individual on a global level, as well as for acts of international destruction of cultural heritage (Cuno, 2016). However, the problem still remains unresolved for this type of liability, i.e. whether the individual is the perpetrator or the participant in this type of crime.

Especially, the crimes against humanity codified in article 7 of the statute of the International criminal Court (StICC) (Ambos,

[2]Draft Policy on the cultural heritage of prosecutor office of ICC-22 March 2022, parr. 34-38.

2022) do not include a specific reference to crimes related to cultural heritage. This gap occurs in the draft article on the prevention and prosecution of crimes against humanity, as approved by the International Law Commission (ILC) of 2019 (Liakopoulos, 2020)[3].

Anti-war crimes also stem from the Hague Conventions of 1899 and of 1907 (Van Dijk, 2022).

The protection of cultural property imposed criminal protection obligations since they required States to prosecute individuals who had violated the prohibition to direct attacks against protected places. In particular, war crimes include a high number of typifications, an immediate perception of the prevalence of *acta rea* with a binding form and typification of the related conduct both in their modality and in their result, effect. War crimes include offensive actions against the human person but also against material goods such as civilian property, the environment, as well as for protected places such as places of worship, hospitals, etc. criminal conduct that affects the human person.

Enhancement of individual responsibility for attacks directed against cultural heritage

[3]Draft articles on Prevention and Punishment of Crimes Against Humanity Resolution A/Res/74/187 of 30 December 2019, without any mention in cultural heritage.

The jurisprudence (Liakopoulos, 2019)[4] on direct attacks on cultural heritage highlighted:

"(...) that traditional crimes against heritage, when they are exploited to harm the human person, can materialize a crime against humanity. (…) The destruction of several places of worship perpetrated during the Balkan conflict (Chainoglou, 2019) was punished, by the International Criminal Tribunal for the Former Yugoslavia (ICTY), as persecution (…)" (Hausler, 2015).

It is unreasonable to believe that the violation of the human right to culture is criminally irrelevant given that it is perpetrated in the context of a systematic or generalized attack on the civilian population[5].

In the same spirit, we recall from the jurisprudence of the ICC the Al Mahdi Al Faqi case (Liakopoulos, 2016)[6] with many doubts about the criminal relevance of the relative violation considered. However, we must accept that the case just mentioned is a step forward in the evolution of the international criminal law[7] and especially in the matter of cultural heritage, having a symbolic importance despite the fact that it has attracted many criticisms of the common opinion.

The attacks directed against the mausoleums of Timbuktu, for which Al Faqi Al Mahdi was sentenced to nine years' imprisonment, remain from 2016 until today the only charge on which the ICC has expressed itself in the context of the situation

[4]ICTY, Prosecutor v. Blaškić, Trial Judgment, IT-95-14-T, 3 March 2000, par. 157.

[5]ICTY, Prosecutor v. Prlić et al., Appeal Judgment, Volume I, IT-04-74-A, 29 November 2017, para. 411.

[6]ICC-01/12-01/15-236, ("Al Mahdi Reparations Order"), para. 10.

[7]See, ICC, Office of the Prosecutor, Strategic plan 2019-2021.

in Mali, as well as more serious violations that had been committed against the civilian population in the area in question (O'Keefe, 2013). The facts judged, i.e. the intentional damage to the mausoleums of Timbuktu are qualified not as crimes against humanity but as war crimes. The judges have followed the path of better a conviction, and a type of justice from an impunity. The protection of cultural heritage in wartime and peacetime is full of perplexities. Thus the destruction of a cultural asset is affirmed as an international crime related to an armed conflict which risks giving rise to a vacuum of protection, leaving the discussion on the *locus standi* of the individual in the international order remaining open (Lostal, Hausler, Bongard, 2017).

Individual responsibility related to cultural heritage is a functional tool for the protection of collective interests and complementary to the international responsibility of the State (Liakopoulos, 2019).

The violation of a *crimen iuris gentium* also entails a double responsibility. On the one hand the individual penal law where the conditions are met, and on the other the international one, of the State. The two responsibilities are independent and do not exclude what is presupposed by articles 25, par. 4 StICC and 58 (Waugh, 2011; Giamanco, 2011; Stephens, 2011; Volker, 2012; Vij, 2013; Ccourtney, Kaoutzanis, 2015; Olàsolo, 2016; Lòpez,

2018; Liakopoulos, 2019; Ambos, 2022) of the Project of articles of 2001 (Cottier, Grignon, 2016: Liakopoulos, 2020). It is not a question of a competition of regimes which include the competition between two possibly systems: of effectiveness rate and of the fundamental international norms, such as international obligations *erga omnes.* The empowerment of the individual becomes the main tool for safeguarding the international order for the protection of human rights themselves (Ambos, 2022).

Do not forget that the StICC adheres to previous experiences (Liakopoulos, 2019; Ambos, 2022), where the protagonist is the individual character, i.e. the man remains at the center of criminal prosecution regardless of his capacity as a state organ (Liakopoulos, 2019)[8]. However, the crimes related to cultural heritage present a structural and controversial requirement: i.e. the opportunity of the international subjectivity of the individual as an assurance of an effective protection of the commons, where the injuries risk otherwise going unpunished. This is a pleonastic impunity which is oriented towards the legality of international norms and *ius cogens:*

"(…) individuals have international duties which transcend the national

[8]International crimes presuppose state participation but this element is not always necessary. International crime can constitute an unlawful act of the State, as we expect to see in the case of a state-sponsored extermination as well as the responsibility of individuals as well as the State. The crime of aggression, on the contrary, is a case of "necessary" competition between the responsibility of the State and the criminal responsibility of the individual-organ.

obligations of obedience imposed by the individual State (…). The individual, who has acted as a state organ, could not invoke functional immunity or *ratione materiae* in his defense (...)" (Kolb, 2017; Liakopoulos, 2020).

The irrelevance of functional immunity before international criminal jurisdiction as noted in art. 27 StICC (Ambos, 2022), is also presented in art. 41 par. 3 of the Project of 2001 (Liakopoulos, 2020), where the consequences arising, according to international law, from the serious violation of a provision of *ius cogens* are presented without prejudice.

Reading together articles 58 and 41 of Project of 2001 and art. 25 StICC (Liakopoulos, 2019; Liakopoulos, 2020) in the event that a state body commits an international crime in the exercise of authority, the traditional principle of functional immunity of a related derogation remains. The centrality of international criminal law prevents individuals from hiding behind "the shield of state sovereignty (…)" (Love, 2012; Trapp, Mills, 2012; Talmon, 2012; Heller, 2013; Klinzing, 2014; Liakopoulos, 2020; Sudre, 2021). The international penal sanction is multifunctional, to the extent that it pursues a retributive and general-preventive purpose. It is the guiding means of the choices of the associates as a deterrent effect with respect to the commission of the offences.

Methodology between statutes and jurisprudence for the international responsibility of the individual in relation to

the intentional destruction of cultural heritage

The methodology that has to do with the criminal relevance in international law of attacks directed against cultural heritage allows us to speak of a systematic, formal and at the same time expressive partition of the *ratio legis* underlying the norms under analysis. The methodological necessary criterion regarding the violation of an international norm considers it integral to an international crime. It should be noted that it is not exhaustive to simply analyze the incriminating norms starting from the traditional categories of international crimes (Berlin, 2020). The problem is not the distinction between war and peace crimes but between the direct and indirect protection of cultural heritage. It is the international jurisprudence that recognizes the relevance of the intentional destruction of cultural property through a more general criminal case such as those protecting the norms under analysis.

The difference between directing an attack against a cultural or a civilian object is therefore important and the two actions integrate two different war crimes; respectively, the crime envisaged by articles 8 par. 2(b)(ix) and 8 par. 2 (e) (iv) in the first case, and that typified by art. 8 par. 2 (b)(ii) and 8 par. 2 (e) (i) in the second (Bellivier, Eudes, Fouchard, 2018). The indirect protection of cultural property is recognized in the practice of the courts where a regulatory activity is developed in the field of

human rights which establishes a correlation between the protection of cultural property and the human right to culture. The practice of the international criminal courts ensures the enforcement of the violated primary norms by taking care of the specific disvalue in the damage to the cultural heritage.

War crimes accompany the crime of persecution which allows repressing indirectly the destruction of cultural heritage even in peacetime (Brammertz et al., 2016)[9]. The systematic classification reconstructs the protection of cultural heritage in international criminal law which pursues the aim of delimiting the criminalization of the intentional destruction of cultural heritage in times of peace. The criminal case is found with the principle of legality where the first corollary is the *nullum crimen, nulla poena sine legge*[10], as a fundamental element of

[9]See, ICC-02/04-01/15-1762-Red ("Ongwen TJ"), para. 2733 (noting that the underlying act of persecution as a crime against humanity may be satisfied by severe deprivation, contrary to international law, of the right to private property). The ICTY has extensively prosecuted attacks on cultural property as an underlying act of persecution, such as in Brđanin and Stakić (primarily mosques and churches), and Šainović and Đorđević (Kosovo Albanian cultural monuments and sacred sites). ICTY, Prosecutor v. Strugar, Trial Judgment, IT-01-42-T, 31 January 2005, paras. 298ss. Prosecutor v. Jokić, Sentencing Judgment, IT-01-42/1-S, 18 March 2004, par. 46.

[10]ECtHR, Maktouf and Damjanović v. Bosnia and Herzegovina, 18 July 2013; Kononov v. Latvia, 17 May 2010; Ould Dah v. France, 17 March 2009; Jorgic v. Germany, 12 July 2007; Linkov v. Republic Czech,7 December 2006; Penart v. Estonia, 24 January 2006; Kolk and Kislyiy v. Estonia, 17 January 2006; Tess v. Latvia, 3 December 2002; Papon v. France, 15 November 2001; Streletz, Kessler, Krenz v. Germany, 22 March 2001; K.-H. W. v. Germany, 22 March 2001; Naletilić v. Croatia, 4 May 2000; Vasiliauskas v. Lituania, 20 October 2015, par. 175 and 178: "(…) there are some arguments to the effect that political groups were protected by customary international law on genocide in 1953 (…) there are equally strong contemporaneous countervailing views (…) the Court finds that there is no sufficiently strong basis for finding that customary international law as it stood in

the rule of law and as a general rule by the European Convention of Human Rights (ECHR) where no one can be punished for behaviors without criminal relevance at the time of their commission and that the legal basis of the indictment meets standards that sufficiently describe the constituent elements of the crime to allow the individual to calculate the criminal risks of his or her actions (Kress, 2010; Sudre, 2021). In this spirit we recall the Korbely v. Hungary case of 2008 (Van Aakken, Motoć, 2018)[11],where international crime: "(...) must consist of a legal basis that has two qualities: accessibility and predictability (...)". It is believed that the incriminating rule is accessible when it can be known by the associates by consulting the means of advertising provided. It should be noted that the assessment of this requirement must be carried out by the European Court of Human Rights (ECtHR) in the light of international primary

1953 included "political groups" among those falling within the definition of genocide (…)".

[11]ECtHR, Korbely v. Hungary (n. 9174/02), 19 September 2008: "(…) Mr. Korbely invoked the responsibility of the Hungarian State for violation of the art. 7 of the ECHR: "(…) consisted in the conviction of the same for a fact that did not constitute a crime when committed. The Hungarian judges had in fact held the applicant criminally responsible for crimes against humanity (consisting of multiple homicides) committed by him in 1956 (…) for facts dating back to the time in which Mr Korbely served as an instructor-officer at a school military. In the aftermath of the Hungarian revolution that broke out in 1956, the man had received the order to repress the insurgents' offensive. In carrying out the order, however, the applicant had caused the deaths of several subjects. For these facts he was subsequently brought to trial, accused of having perpetrated crimes against humanity. As a basis for the indictment, the Hungarian authorities had placed not a domestic law, but customary international law, in particular art. 3 of the Geneva Conventions (...) the conviction was based on a legal basis lacking the necessary predictability: in 1956, it was not foreseeable for the appellant that the fact committed constituted an international crime (...)".

standards, i.e. the statutes of international criminal courts. The same Korbely ruling states:

"(...) se prononcer sur la responsabilité pénale individuelle du requérant, cette appréciation incombant en premier lieu aux juridictions internes, mais d'examiner sous l'angle de l'article 7 § 1 de la Convention si, au moment où elle a été commise, l'action de l'intéressé constituait une infraction définie avec suffisamment d'accessibilité et de prévisibilité par le droit interne ou le droit international (…) n'entre pas dans ses attributions de tenter de se prononcer, par un argument d'autorité, sur la signification de la notion de 'crime contre l'humanité (…)" (Morales, 2020).

Changing jurisprudential orientation, we recall the leading case that is offered by the practice of the ICTY above all in the old ruling of the Tadić case of 1995[12]. The ad hoc Tribunal affirmed its jurisdiction *ratione materiae* with respect to statutory cases whose conformity with the principle of legality was contested by the Defense which expressed itself on the conditions in the presence of which the violation of an international obligation generates individual criminal responsibility at an international level. The violation of art. 3 common to the Geneva Conventions constitutes an international crime perpetrated in the context of an asymmetric conflict, where the judges have investigated the international obligations of penal protection and have verified whether these had been transposed into the national penal codes.

Criminal cases, such as for example rape and terrorism, include any sexual act that took place in the absence of the victim's

[12]ICTY, Prosecutor v. Duško Tadić, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, par. 194.

consent and the ICTY spoke for principles of law common to national legal systems without a request for perfect identity of national legislations:

"(...) considering it sufficient to ascertain that the latter are homogeneous: quoting the international judges verbatim (…) common denominators in these legal systems so as to pinpoint the basic notions they share (…)" (Pitea, 2005; Joyce, 2011; Jarvis, 2017; Liakopoulos, 2019)[13].

The Special Tribunal for Lebanon has reconstructed an international definition for the crime of terrorism (Azzolini Biancaz, 2018)[14]:

"(…) to turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime (…) (Stahn, Agius, Brammertz, Rohan, 2020)".

Thus a general secondary international norm is reconstructed taking into account the practice of international criminal courts

[13]ICTY, Prosecutor v. Furundžija, Case No. IT-95.17/1-T, judgment, 23 July 2009, par. 178: "(…) whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions:

(i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share (…)

(ii) since "international trials exhibit a number of features that differentiate international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings (...)".

[14]Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, 16 February 2011.

capable of incriminating that the fact in question has reached through national legal systems. The intentional destruction of cultural heritage constitutes an international crime that only fulfills a prosecution obligation, a treaty crime.

(Follows): The *figurae criminalis* concerning war crimes

The attention of the international community for crimes against cultural heritage was noted during the Second World War especially for the paintings of famous artists such as Raphael, Vermeer, Rubens and Rembrandt (Lippman, 1998). The destruction of artistic works are distinguished from immobile culture such as the devastation of the cities of Novgorod and Odessa (churches, chapels, synagogues) and their artistic-historical monuments in relation to those in charge of the Military Tribunal found a particular attitude of contempt, but not enough to be a nod to the protection of cultural heritage (Lippman, 1998)[15].

The Statute of the Military Tribunal of Nuremberg did not mention criminal cases specifically concerning cultural property. Already at the time article 6 lett. b) of the Statute of International Military Tribunal for the Far East affirms that:

[15]"(...) they broke up the estate of the poet Puškin in Mikhailovskoe, desecrating his grave, and destroying the neighboring villages and the Svyatogorsk monastery. They destroyed the estate and museum of Lev Tolstoj, Jasnajà Poljana and desecrated the grave of the great writer. They destroyed in Klin the museum of Čajkoskij and in Penaty the museum of the painter Repin and many others (…)".

"(…) plunder of public or private property (…) wanton destruction of cities, towns or villages, or devastation not justified by military necessity (…)" the offenses perpetrated to damage the movable and immovable cultural heritage.

Of course it is noted that art. 6, letter b) has a general character and does not express a specific negative value on a formal level but offers interesting food for thought. The aim was to safeguard further fundamental interests, such as the principle of legality and that of guilt which are not susceptible to derogation. The facts judged did not constitute a crime according to the international law in force at the *tempus commissi delicti,* where the principle of legality follows an argumentative process in the jurisprudence of the ICTY (O'Keefe, 2013)[16]. Individual criminal liability is a source of law that contains the incrimination of the case where it is recalled that art. 56 of the Hague Rules put cultural property in the spotlight of the course of armed conflicts and as the basis of a negative obligation

[16]ICTY, Prosecutor v. Furundžija, Case No. IT-95.17/1-T, judgment, op. cit., par. 64: "(…) undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war' which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in article 6 (b) of the Charter (…) the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings (…) family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated (…)".

where the recipients are the States. The Court arrives:

"(...) on the regulatory support offered by art. 56 (…). It should be made the subject of legal proceedings (…). The regulatory provision allows the individual to be considered only an indirect addressee of the international law. In fact, this obstacle does not seem to have been ignored by the Nuremberg Tribunal, which questioned the existence of an international norm that contains the imposition of individual penal sanctions (...)" (Van Dijk, 2022)[17].

The direct accountability of the individual highlights the laws of war that find their foundation not only in treaties, but also in the customs to which States conform, as well as in the general principles of justice applied by military tribunals[18]. Violation of the rules in question constitutes an international crime: "(…) for which the guilty individuals were punishable too well settled to admit of argument (...)". According to the Nuremberg Tribunal, articles 46 and 56 could be:

"(…) recognised by all civilised nations and were regarded as being declaratory of the laws and customs of war referred to in article 6(b) of the

[17]ICTY, Prosecutor v. Furundžija, Case No. IT-95.17/1-T, judgment, op. cit., par. 63.

[18]ICTY, Prosecutor v. Furundžija, Case No. IT-95.17/1-T, judgment, op. cit., par. 40: "(…) the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing (…)".

Charter (...)"[19].

Criminal justice was respectful of the fundamental principle of guilt and it seems to us well evidenced by the story relating to the Einsatzstab Rosenberg (Lippman, 1998), i.e. the committee organized and managed by Alfred Rosenberg, who took charge of requisitioning books and works of art in the invaded territories[20]. The Nazi regime documented what was confiscated, issuing a receipt of the confiscation to the owner of its property (Walsh, 1996).

The reconstruction of individual responsibilities in relation to the perpetration of the crime in execution of the higher order, and within an organization is functional of humanity that does not extend to international crimes. The merit of having established that:

"(…) individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law (...)"[21].

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[19]ICTY, Prosecutor v. Furundžija, Case No. IT-95.17/1-T, judgment, op. cit., par. 39.

[20]"(…) acting under Hitler's orders of January 1940, to set up the "Hohe Schule", he organised and directed the "Einsatzstab Rosenberg", which plundered museums and libraries, confiscated art treasures and collections and pillaged private houses. His own reports show the extent of the confiscations. In "Action-M", instituted in December 1941, at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of 14th July 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the West (…)".

[21]"(…) the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires (...)".

The perpetration of crimes in an organized form and the models of ascribing responsibility provided for by the Statute of the International Military Tribunal for the Far East took into account the principle of personality of criminal responsibility since they applied the pertinent statutory provisions, where the Tribunal punished according to the crime of complicity in the crime of some ancillary conduct with respect to the material execution of the confiscation, destruction or damage to cultural property which otherwise would not have had criminal relevance.

In the context of a criminal organization, which was the Rosenberg committee, we can say that the principle of personality of criminal responsibility was interpreted within the foreclosure and the attributions of responsibility for the acts of others as forms of strict liability. A member of an organization declared criminal was held liable for the crime committed by the organization provided that he had knowledge of the criminal purposes or acts of the organization, or that he had been personally implicated in the commission of the crime. The recognition of a *quid pluris* in the crimes committed to the detriment of the cultural heritage of the Nazi forces seems to recall the criminal illicitness of the destruction of the cultural heritage according to art. 6, letter. b) of the statute, conduct justified for military reasons and needs.

Thus, the Nuremberg Tribunal excluded that the facts judged

were thus discriminated given that they were not dictated by military necessity but by the desire to exploit the population and resources of the occupied countries. The acts promoted the Nazi economic supremacy of the time by enriching its population and obtaining a cultural hegemony on the assumption that art was an essential competence for the ideology of Aryan utopia (Guggenheim, 1998). It is significant that the monetary relationship of the cultural good is aware of being treated like any civil good.

This was the spirit that was adopted in articles 8(2)(b)(ix) and 8(2)(e)(iv) StICC where the war crime consists of:

> "(...) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives (…)" (Ambos, 2022).

It is a *lex specialis* in relation to articles 8(2)(e)(xii) and 8(2)(b)(ii), the rationale of which was to safeguard civilian properties in order to guarantee the civilian population a minimum standard of protection in times of war (Ambos, 2022). This criminal *"ratione temporis and ratione materiae"* figure foresees precise consistent criminal phenomena which are essential for the destruction of cultural heritage caused "collaterally" by war actions. A cultural property is an international crime only if it is consumed in the course of an international war and a regulatory gap arises. No written provision stipulated that such conduct was a serious breach, such as a war crime and within an internal

conflict.

The ICTY has already given it an internationalized nature (Liakopoulos, 2020)[22] marking the provisions of the StICC and of II Protocol of 1999 stating that cultural heritage in internal armed conflicts needs the same protection it receives in international armed conflicts. The aim was to reconstruct the criminalization of the material conduct in question. The judges took note of art. 3 common to the Geneva Conventions in the light of both art. 16 of the II Additional Protocol of 1977 and art. 19 of the 1954 Hague Convention (Buirette, 2019). We are talking about customary norms that impose respect for cultural heritage even in internal conflicts[23]. The norms mentioned are placed under the systematic and teleological argument according to which such norms as principles of international humanitarian law reflect:

"(…) elementary considerations of humanity (DeGuzman, 2020); where the application is necessary in any armed conflict in a way that guarantees a minimum and indispensable standard of protection for the civilian population: "(…) is inhumane and consequently proscribed, in international wars, cannot but be inhumane in civil strife (...)[24].

[22]ICTY, Prosecutor v. Tadić, Appeals Chamber, Judgment, op. cit., par. 104. "(…) not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity (…) t is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law (...)". The overall control test differs that the goal it pursues in an international conflict from the effective control test is instead necessary, as we can see in the case: ICJ, Military and paramilitary activities in Nicaragua (Nicaragua v. United States), precautionary measures, ordinance, 10 May 1984, ICJ Reports 1984.

[23]ICTY, Prosecutor v. Hadzihasanović-Kubura, 27 September 2004, Trial Chamber, Decision on motions for acquittals, parr. 96-98.

[24]ICTY, Prosecutor v. Duško Tadić, 2 October 1995, Appeals Chamber, Decision

Within this spirit we recall the Kordić & Ćerkez case, where the ICTY affirms that:

"(…) value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people (…)" (Zammit Borda, 2021)[25].

The human-centric nature of the protected interest is also explained and based in the construction of the case of danger offenses where the *actus reus* allows directing the attack and is integrated and does not follow the damage to the attacked property (Wierczyńska, Jakubowski, 2017)[26]. The property protected by the war crime in question affects its physiognomy and serves to delimit its field of application as an act that not

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on the defence motion on interlocutory appeal for jurisdiction, parr. 119 and 128: "(…) if international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight (…)".

[25]ICTY, Prosecutor v. Kordić & Ćerkez, 17 December 2004, Appeals Chamber, Judgment, IT-95- 14/2-A, par. 89-92: "(…) at the outset, the Appeals Chamber notes that international instruments provide two types of protection for cultural, historical and religious monuments. There is the general protection, which is provided for, *inter alia*, under article 52 of Additional Protocol I and applies to civilian objects. The protection provided is that the building or monument cannot be destroyed unless it has turned into a military object by offering the attacking side "a definite military advantage" at the time of the attack. Schools and places of worship are part of this category of buildings. Certain objects are given special protection (…) The special protection conferred by article 53 of Additional Protocol I applies to three categories of objects: historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples (…) cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people (…)". ICTY, Prosecutor v. Milan Martić, 12 June 2007, Trial Chamber, Judgment, IT-95-11-T, par. 97. Prosecutor v. Kayishema and Ruzindana, Trial Judgment, ICTR-95-1-T, 21 May 1999 ("Kayishema TJ"), para. 151. Article 5(i) of the ICTY Statute and article 3(i) of the ICTR Statute do not contain the Rome Statute element "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (…)".

[26]ICC, Pre-Trial Chamber I, Prosecutor v. Ahmad Al-Faqi Al-Mahdi, 1st March 2016, parr. 43-44.

every violation of the prohibition directs attacks against cultural property transformed into a military objective. The unlawful act of the attack is subject to the persistence of the civilian character of the protected place.

In the Jokić case, the ICTY affirms:

"(...) that the prosecution had discharged its probative burden of demonstrating that the siege of the ancient city of Dubrovnik had not occurred for military necessity since, according to the judges, it could be presumed that the city was a demilitarized area by virtue of its inscription in the world cultural heritage list (…)" (Schabas, 2010; Soler, 2019)[27].

The sentence against Pavle Strugar is in the same line of thought:

"(…) the argument of the defense according to which the city was used for military purposes by the Croatians was rejected, given that according to the military records of the Yugoslav army (…) it did not appear that within the walls of the ancient city there were any weapons or positions from which to open fire (…)"(Liakopoulos, 2005)[28].

The criminal case guarantees the cultural heritage a comparable immunity, from a substantial point of view as provided for the generality of civil assets since it is attributed and specific legal value to the protection of cultural assets where the obligation to save the aforementioned assets is in force and continues to be civil[29]. The case is based on the general principle of distinction which provides the war crime in question with the intentionality

[27]ICTY, Prosecutor v. Jokić, Trial Chamber, Judgment, cit. par. 66-67: "(…) awareness by Miodrag Jokić that it (Dubrovnik) had been included in the UNESCO Registry of World Cultural heritage in 1979 and that, as such, the area was supposed to be demilitarized (…)".

[28]ICTY, Prosecutor v. Strugar, Trial Chamber, Judgment, cit. par. 193: "(…) the evidence of Croatian firing positions or heavy weapons within the Old Town on 6 December 1991 is inconsistent, improbable, and not credible "(…).

[29]ICTY, Prosecutor v. Radoslav Brđjanin, 3 April 2007, Appeals Chamber, Judgment, IT-99-36-A, par. 337).

that constitutes an illicit method of conducting hostilities. Attacks that are carried out during an armed conflict and that are eccentric and come from a different motive. This hypothesis occurs when the cultural asset is destroyed when the area is under military occupation or the destruction is intended to erase the traces of the cultural identity that each asset represents. War crime includes the *actus reus* during an internal or international armed conflict. The war crime is disputable and it is not sufficient that the act took place in the context of an armed conflict:"(…) must be closely related to the armed conflict as a whole (…)". In the Kunarac case, the ICTY affirms that:

"(…) the connection is not to be understood as a geographical and temporal contiguity between material conduct and combat: war crimes in fact are distinguished from common crimes because they are shaped by or dependent upon the environment (...)"[30].

There is no need for a causal relationship between the conflict and the conduct because it is sufficient that the existence of the armed conflict plays a central role in the ability, manner or purpose of the commission of the crime[31].

In the Brđjanin case, the ICTY considered sufficient:

"(...) recklessness, as constituting a less intense form of intent, in which the perpetrator acts intentionally, representing to himself the probability of destruction or damage and accepting their verification (...) the war crime in question is integrated, the agent does not need to want the damage or destruction of the cultural property, provided that such events are foreseen by him, and accepted, as probable consequences of his intentional action (…)"

[30]ICTY, Prosecutor v. Aleksovski, Trial Judgment, IT-95-14/1-T, 25 June 1999, para. 56. Prosecutor v. Dragoljub Kunarac, 16 June 2002, Appeals Chamber, Judgment, IT-96- 23& IT-96-23/1-A, parr. 57-58.

[31]ICTY, Prosecutor v. Kunarac, Appeals Chamber, Judgment, cit., parr. 57-58.

(Werle, Jessberger, 2020)[32].
It seems adequate to prevent and repress the only violations of the human right to cultural heritage that are exhausted in an incorrect way of conducting the armed conflict.

Destruction of cultural property as a crime of humanity and of persecution

The intentional destruction of cultural property presents a unitary appearance of two different criminal phenomena. On the one hand, the attack on cultural heritage and the damage that can result from armed conflicts. On the other hand, the ethnic cleansing as for example of the Bosnian minority in the Balkan conflict that led to the limited application of war crimes.
The choice in the Al Mahdi Al Faqi case (Wierczyňska, Jakubowski, 2017) seems qualifying and anachronistic of the extent to which it reduces the crimes perpetrated to mere violations of the laws and customs of war. The *tempus commissi delicti* coincides with the period in which the city of 333 saints was subject to military occupation by the jihadist organization Ansar Dine. Their goal was to impose their own fundamentalist vision of sharia. There was no relationship except in terms of

[32]ICTY, Prosecutor v. Brđjanin, Trial Chamber, Judgment, cit., par. 599: "(…) destruction or wilful damage done to institutions dedicated to religion must have been either perpetrated intentionally, with the knowledge and will of the proscribed result or in reckless disregard of the substantial likelihood of the destruction or damage (…)". In the same spirit of orientation see also: ICTY, Prosecutor v. Martić, Trial Chamber, Judgement, cit. par. 99; TPIJ, Prosecutor v. Enver Hadzihasanović & Amir Kubura, 15 March 2006, Trial Chamber, Judgment, IT-01-47-T, par. 59.

temporal contiguity between the destruction of cultural sites and the Malian civil war. The Prosecutor of ICC had already requested investigations into the destruction of mosques, madrassas, religious clothing and symbols[33] which was committed by the Tatmadaw military forces to persecute the Rohingya minority. The accusing hypothesis of many criminal conducts was the violation of fundamental rights that integrate the extremes of crimes against humanity[34]. The destruction of a material good can actually enter the category of crime against humanity where its essence consists of a serious violation of the rights of the person. The juridical qualification does not prevent the construction of crimes against humanity which persists in the StICC according to the human-centric circle. Nothing prevents us from arguing that cultural property denies the rights of the person both as an individual and as a community.

Already the ICTY in the Kordić & Ćerkez case back in 2001 stated that:

"(...) among the human rights denied to persecuted minorities there were not only civil and political rights, but also cultural ones. The denial of the cultural rights of discriminated minorities, reverberating on the right of all humanity to cultural heritage, has also been figuratively defined as "cultural

[33]ICTY, Prosecutor v. Brđanin, Trial Judgment, IT-99- 36-T, 1 September 2004, para. 691. "Slow death" methods directed specifically at cultural heritage may include, but are not limited to: forcible imposition of a diet that does not conform with a group's religious practices, or the denial of medical services that comports with the practiced cultural heritage of the targeted group. For an example of this, see Case 002/02 TJ, paras. 3238, 3245 (finding that the Cham had been forced to abide by the same dietary regime as the Khmer, including eating pork).

[34] Office of the Prosecutor, Request for authorisation of an investigation pursuant to article 15, 4 July 2019, ICC-01/19, spec. par. 178 ss.

cleansing" or "memoricide" (...) such statements would be incorrect, however, to diminish their significance by associating them with a jurisprudential expedient aimed at sanctioning violations that otherwise would have risked going unpunished because they do not constitute war crimes (…) in assessing the impact of the hermeneutical approach described above, is that having cleared the application of crimes against the humanity would have brought with it the only advantage of making the attack on a cultural asset punishable even when it does not belong to the opposing belligerent party (…)" (Stahn, Agius, Brammertz, Rohan, 2020).

War crimes require that the active and passive subject of the violation belong to the opposing sides in the conflict and constitute the so-called: inter-party offenses (Soler, 2019; Liakopoulos, 2019; Ambos, 2022)[35].

Within this circle, the Nuremberg Tribunal has already ascertained:

"(...) that the anti-Semitic persecution was also expressed in conduct harmful to property belonging to Jews, such as burning and demolishing of synagogues, the looting of Jewish business (...)"[36].

Thus we recall the condemnation of Julius Streicher for the fire set at the Nuremberg synagogue on the night of 10 August 1938 and his own punishment by way of persecution. In the Eichmann case, judged by the District Court of Jerusalem, on the basis of Law no. 10 of the Allied Control Council for Germany:

"(...) the persecution against the Jews had taken the form of acts of violence directed against their person and their property; here reference was made, in particular, to the Crystal Night (10 November 1938) during which, in German cities, shops and houses belonging to Jews were stormed, 191 synagogues were set on fire and 76 of these were demolished (…)" (Shaked,

[35]ICC, Trial Chamber VI, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-309, Judgment, 8 July 2019, parr. 949-986. ICC, Pre-Trial Chamber I, Prosecutor v. Katanga and Ngudjolo Chui, ICC- 01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, par. 329.

[36]ICC, Pre-Trial Chamber I, Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07, Decision on the Confirmation of Charges, op. cit., par. 61.

2015)[37].

The category of crimes against humanity was unknown before the Nuremberg experience in the international community.

The international judges have followed the case of persecution and the intentional attacks directed against cultural property is a belief that the correlation between the crime of the principle of legality according to art. 6, letter. c) of the statute of Nuremberg required persecution:

"(…) for political, racial or religious reasons (…) in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated (…)".

The persecution related to war crimes or crimes against peace was characterized as a crime that could only be carried out in the context of an armed conflict and excluded from the facts committed before 1939, i.e. before the outbreak of hostilities, therefore constituted crimes against humanity.

ICTY to the repression of the iconoclastic destruction during the Balkan conflict

The cultural targets destroyed in Bosnia Herzegovina in the Croatian region of Krajina, i.e. the fortress of Stara Gradiśka on the Sava river, the bridge of Mostar[38], the national library of

[37]District Court of Jerusalem v. Adolf Eichmann, Judgment, 11 December 1961, Case No. 40/61, par. 57.

[38]Final Report: "(…) bridge was well known to the population in the region, whether Serbian, Croatian or Muslim. Moreover, the bridge was a symbol of Bosnia and Herzegovina, which connected the gap between the Muslim and Croat communities. It embodied the links, which united these peoples in spite of their religious differences and the circumstances of the present war. There can be no doubt, however, that it was of greater value to the Muslims (…)" (p. 68).

Sarajevo, the Roman villas of Split and the archaeological site of Vukovar are some of the assets protected by what we call cultural heritage and are part of the jurisprudential argument of the ICTY(Abtahi, 2001; Merin, 2005; Gerstenblith, 2016).

Already the Final Report drawn up by the Commission of experts appointed for this purpose by the Security Council of the U.N. (Delting, 1993), spoke of mass murders, torture, rapes and other inhuman acts, eradicate cultural, social and religious traces that identify the ethnic and religious groups. Already art. 5, letter. h) Statute of the ICTY specifies the persecution as a serious denial:

"(...) of the fundamental rights recognized by international law; which has the same seriousness as other acts which constitute crimes against humanity (b), and which aims to exclude certain people from society for discriminatory reasons (c) (...)"[39].

In reality, the cited article recalls the art. 7 (1) (h) StICC (Liakopoulos, 2019; Mettraux, 2020; Ambos, 2022)[40]. The judges' problems go back to some interpretative uncertainties

[39]ICTY, Prosecutor v. Kupreškić, Trial Chamber, Judgment, cit. par. 621; Prosecutor v. Blaškić, Appeals Chamber, Judgment, cit., parr. 139-141: "(…) it must be demonstrated that the acts underlying the crime of persecutions constituted a crime against humanity in customary international law at the time the accused is alleged to have committed the offense. As stated above, these acts must constitute a denial of or infringement upon a fundamental right laid down in international customary law. It is not the case that any type of act, if committed with the requisite discriminatory intent, amounts to persecutions as a crime against humanity (…)".

[40]ICC, Prosecutor v. Gbagbo, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014, parr. 204, 193-199; Prosecutor v. Muthaura et al., Pre-Trial Chamber II, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, parr. 283, 233, 243, 257, 270-271, 275-277; Prosecutor v. Ruto et al., Pre-Trial Chamber II, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, parr. 271-272, 225-226, 228-239, 241-242, 248-251, 253-266.

concerning:

"(...) the identification of which human right can be considered violated in the case of intentional destruction of cultural heritage (a); secondly, the assessment of the consequences deriving from the destructive act, the seriousness of which must in any case be demonstrated (b); and finally, the ascertainment of the link between the destroyed asset and the persecuted group, proving the discriminatory reason for the perpetrator (c) (...). The *actus reus* of persecution consists in fact in the commission of an act, or an omission, which is discriminatory against a group for political, racial or religious reasons (...)"[41].

Discrimination takes the form of violation of human rights recognized by international law (Mettraux, 2002)[42], i.e. the right to life, liberty, security, human dignity, torture, economic, social and political rights[43].

The ICTY has framed the phenomenon of denial of human rights in the jurisprudence of relevant international human rights courts. Let us recall the Blaškić case, where:

"(…) it was considered that Bosnian Muslims had been denied not the right to culture, but the right to inviolability of property (...)[44] (…) A more avant-garde attitude however, it emerges from the equation of cultural cleansing with an attack on the religious identity of a people, the negative effects of which are believed to affect the entire human race (...)"[45].

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[41]ICTY, Prosecutor v. Karadžić, Public Redacted Version of Judgement Issued on 24 March 2016, IT-95-5/18-T, 24 March 2016, paras. 530-534: "(…) charged the widespread destruction of religious and similar buildings, as part of campaigns of 'ethnic cleansing', on the basis of the same international treaties underlying articl es 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii) of the Statute-such as the 1907 Hague Regulations, Geneva Convention IV, and Additional Protocol I-but often did so as an underlying act of persecution, a crime against humanity. In this context, it did not apply an "adverse party" requirement (…)". See also: Prosecutor v. Stakić, Trial Chamber, Judgment, cit., par. 733.

[42] "(…) the fact that a given prohibition appears in the Statute does not necessarily render it an offense under customary international law (…)".

[43]ICTY, Prosecutor v. Kupreškić, Trial Chamber, Judgment, 15 May 1998, par. 597, 615.

[44]ICTY, Prosecutor v. Blaškić, Appeals Chamber, Judgment, cit., spec. par. 144 ss e par. 422.

[45]ICTY, Prosecutor v. Kordić & Ćerkez, Trial Chamber, Judgment, cit., parr. 205-

In the Karadzić case:

"(…) the destruction of Islamic and Catholic places of worship was considered serious as it was harmful to vital assets[46]. In ascertaining the specific *mens rea* that characterizes the crime of persecution (…) the need to ascertain a specific intent on the part of the active subject seems to predominate, i.e. the intention to discriminate, which constitutes a quid pluris with respect to the subjective state required for the other crimes against humanity, but at the same time a quid minus with respect to the genocidal intention, consisting instead in the more serious desire to destroy the protected group, in whole or in part (…)"(Mettraux, 2002; Nersessian, 2007)[47].

The assessment of the discriminatory purpose that affects cultural goods is seen as a general difficulty of proving a subjective state and a demonstration of correlation between the affected good and the persecuted group. The relevance of the denial of human rights is correlated with cultural heritage, in this case the right to culture or to property, as well as the seriousness of the implications deriving from destructive and discriminatory

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[46]ICTY, Prosecutor v. Karadzić, Trial Chamber, Judgment, cit., par. 2552-2555-2556: "(…) with respect to the cultural monuments and sacred sites, the Chamber found that the sites destroyed were targeted given their significance to the Bosnian Muslim or Bosnian Croat people in those locations and were discriminatory in fact and were carried out with discriminatory intent (…)". ICTY, Prosecutor v. Stakić, Trial Chamber, Judgment, op. cit. par. 811-812.

[47]ICTY, Prosecutor v. Stakić, Trial Chamber, Judgment, cit. par. 738. ICTY, Prosecutor v. Kupreškić, Trial Chamber, Judgment, cit. par. 636: "(...) both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (…) while in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong (…)". ICTY, Prosecutor v. Miroslav Deronjić, 30 March 2004, Trial Chamber II, Sentencing Judgment, IT-02-61-S, par. 102-123-124. According to Nersessian: "(…) the essence of persecution is unlawful discrimination, rather than underlying conduct *per se* (…)".

conduct.

The discriminatory assessment would end when the cultural asset has been attacked and considered, in the psyche of the active subject, as a tangible representation of the persecuted group[48]. International judges define: "(…) the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status (...)"[49].

On the other hand, the discriminatory reason does not end with the subjective element since it also extends to the objective level. The *de facto* discriminatory act is objectively directed against a specific group[50]. In this case we speak of persecution only in the event that cultural goods are destroyed that are objectively representative of a group discriminated against for racial, political or religious reasons.

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[48]ICTY, Prosecutor v. Kvočka et al., Trial Chamber, 2 November 2001, Judgment, IT-98-30/1-T, par. 195. "(…) the Trial Chamber notes that persons suspected of being members of these groups are also covered as possible victims of discrimination. For example, if a Bosnian Serb was targeted on suspicion of sympathizing with Bosnian Muslims, that attack could be classified as persecutory. Additionally, if a person was targeted for abuse because she was suspected of belonging to the Muslim group, the discrimination element is met even if the suspicion proves inaccurate (…)".

[49]ICTY, Proseutor v. Naletilić & Martinović, Trial Chamber, Judgment, cit., par. 636.

[50]ICTY, Prosecutor v. Milorad Krnojelac, 15 March 2002, Trial Chamber II, Judgment, IT-97-25- T, par. 432: "(…) in favour of a requirement that the act be discriminatory in fact. Without such a requirement, an accused could be convicted of persecution without anyone actually having been persecuted. In addition, the distinction between the crime of persecution and other crimes would be rendered virtually meaningless by depriving the crime of persecution of the qualities that distinguish it from other prohibited acts, such as murder and torture, which have as their object the protection of individuals irrespective of any group association (...)". See also in argument: Prosecutor v. Milan Milutinović et al., 26, judgment, 2009, case no. IT-05-87-T, par. 205.

In the subjective case we note the difficulty concerning the discriminatory conduct that falls on a place of worship and as happens in the Yugoslav conflict[51]. Discrimination in this case is based on a destructive conduct which is inferred from the objective circumstances and as noted in the Blaśkić case: "(...) the absence of strategic value of the affected place or its sacred value within a certain religion (...)"[52].

More difficult is the discriminatory demonstration that has to do with the aggression directed against a cultural and historical asset. Apart from the destruction of religious places, attention is focused on facts such as the siege of the historic center of Dubrovnik in the former Yugoslavia as well as the indictment of the defendants Jokić and Strugar guilty not of persecution, but of war crimes[53]. The question was based on art. 7 (1) (h) StICC (Ambos, 2022) as well as on art. 2 of the draft of the 2019 Code of Crimes against Humanity (Liakopoulos, 2020) which concerned the persecution as partially resolved. Most present the typification with respect to art. 5 lett. h) of the Statute of ICTY

[51]ICTY, Prosecutor v. Stanišić and Simatović, Trial Judgment, Volume I, IT-03-69-T, 30 May 2013, para. 1250 (including the destruction of worship places as a discriminatory act); Prosecutor v. Đorđević, Trial Judgment, IT-05-87/1, 23 February 2011, paras. 1810, 2151 (stating that the destruction of worship places as symbols of Kosovo Albanian heritage and identity was committed with persecutory intent, which manifested itself in the attack, as religious buildings were destroyed because of their religious and cultural significance).

[52]ICTY, Prosecutor v. Blaškić, Appeals Chamber, Judgment, cit., par. 411. ICTY, Prosecutor v. Kordić & Ćerkez, Appeals Chamber, Judgment, cit., par. 674; Prosecutor v. Karadzić, Trial Chamber, Judgment, cit., par. 5824.

[53]ICTY, Prosecutor v. Jokić, Trial Chamber, Judgment, cit.; Prosecutor v. Strugar, Trial Chamber, Judgment, op. cit.

(Klamberg, 2017; Ambos, 2022) and expressly clarifies that the persecution is based not so much on juridical but on political, racial, religious, ethnic, national, gender and even cultural reasons. It should be noted that the group or community should be identifiable allowing for the difficulties associated with the need to demonstrate the objective existence of the cultural relationship between the affected property and the category of discriminated persons.

Extraordinary chambers established in Cambodian Courts and cultural cleansing

The cultural cleansing argument has also been adopted by the Extraordinary Chambers in the Courts of Cambodia (ECCC) (May, Hoskins, 2016)[54], which tried those responsible for crimes committed by the pro-communist Khmer Rouge regime (Cayley, 2012; Klabers, 2012; Cronin-Furman, 2013)[55].

The conviction of the Nuon Chea and Khieu Samphan case for crimes against cultural heritage dates back to 18 November 2018, where the Cambodian Chambers recognized:

"(...) the guilt of the defendants for genocide and persecution; in the over two

[54]The Extraordinary Chambers (ECCC): "(…) the purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979 (…)".

[55]ECCC, Prosecutor v. Chea and Samphan (002), Judgment, TC, 002/19-09-2007/ECCC/TC, 7 August 2014, par. 1055.

thousand pages of the sentence, there are also charges relating to cultural heritage[56] (...) the effort to bring justice to the victims of the atrocities committed (Dijkstal, 2019), the ruling comes "beyond the deadline", since it has could only concern half of the original defendants: pending the trial, which took place with a delay of over thirty years, the deaths of the other two accused occurred (Ieng Sary and his wife Ieng Thirith, who respectively died in 2014 and 2015)[57] (…) the accusatory hypothesis accepted in the decision (…) *ratione materiae* the crime of destruction of cultural heritage is the subject of an autonomous regulatory provision (...)".

According to art. 7 of the Cambodian Law, the jurisdiction in fact also extends to all suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict. Although in this case the punishment for the attacks and the destruction of cultural property is under the heading of war crime, the Chambers have followed the path of crimes against humanity (Davis, Mackenzie, 2014)[58]. An estimated 3,369 Buddhist temples were destroyed, 130 Cham Muslim mosques damaged, 73 Christian churches demolished; the Catholic cathedral in Phnom Penh was torn apart stone by stone (Gottlieb, 2005).

The persecution according to art. 5 of the Cambodian law is qualified as a crime against humanity and integrates a serious violation of fundamental rights as part of a systematic,

[56]ECCC, Co-Prosecutors v. Nuon Chea and Khieu Samphan, Trial Chamber, Judgment, 18 November 2018, Case File/Dossier No. 002/19-09-2007/ECCC/TC.

[57]Office of the Co-Investigating Judges, Closing Order of 15 September 2010, case n. 002/19-09-2007- ECCC-OCIJ.

[58]Case 002/02 (Judgment), ECCC, Case File No. 002/19-09-2007/ECCC/TC, 16 November 2018 ("Case 002/02 TJ") paras. 3238, 3245 (referring to members of the Cham people being forced to eat pork, although not in that case finding such action as an outrage upon personal dignity as such).

widespread and direct attack against the civilian population.

The Cambodian defendants were convicted of destroying cultural sites and for having distorted or transformed their original function. The transformation of the intended use of the asset aimed at obliterating the link between the asset and the identity that it represents a material conduct susceptible to the concretization of persecution, the annihilation of a culture, has a genocidal *mens rea* nature. A conduct that constitutes the physical destruction of minorities through mass killings as happened with the Buddhist monks and the Muslim Chams, materializing a genocide in the strict sense (Lingaas, 2016)[59]. We speak for a cultural genocide where the evidence of the material element is necessary to base the accusation of genocide in practice (Horsington, 2004; Kingston, 2015). The jurisprudence of the Chambers have followed the path of the International Court of Justice (ICJ) for the crime of genocide (Liakopoulos, 2020)[60], a customary value and integrated by

[59]According to the authors (Behrens, Henhamm): "(...) this criticism is misconceived as it ignores the ECCC's obligation to uphold the principle of legality. It is precisely because of the principle of legality that courts must be satisfied to a high standard that a from of criminal responsibility submitted by the prosecution is reflective of international law. If a norm was less than certain, then how can it be said that such norm was sufficiently foreseeable to the accused? Certainty is not, as Scheffer and Dinh seem to suggest, a mere optional standard with which to judge relevant jurisprudence (...)".

[60]ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, ICJ Rep. 4 ("Bosnia v. Serbia and Montenegro (Genocide Convention) Case"), para. 344; Krstić AJ, paras. 25-26; Prosecutor v. Krstić, Trial Judgment, IT-98-33-T, 2 August 2001, paras. 550, 580.

material conduct that leads to the death of a national, ethnic, racial or religious group that determines the biological or physical destruction of this (Akhavan, 2015; Fournet, 2015; Steinfeld, 2015; Gillich, 2016; Liakopoulos, 2020)[61]. The destruction of cultural heritage and generally of what we call culture involves only the cultural dimension.

The Cambodian Chambers move within this circle, considering the jurisprudential panorama adhering to the ICJ and the ICTY as innovative, where in practice the international jurisdiction returns to clarify the different importance that a crime against cultural heritage assumes a certain respect to genocide and ethnic cleansing. A legal logic that is supported by jurisprudential practice. We recall the Krstić case, where the ICTY affirms that:

"(…) one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community (...)"[62].

The uprooting of a culture is susceptible to a material conduct which materializes in persecution and results in the destruction of the cultural or social substratum of the persecuted group. Genocidal intent goes hand in hand with the biological or physical destruction of the protected group, a national, ethnic,

[61]ICJ, Case concerning the application of the Convention on the Prevention and punishment of the crime of genocide (Croatia v. Serbia), Judgment, 3 February 2015, parr. 136, 386, 402-430. According to Steinfeld: "(…) observing that the Court made ethnic cleansing become "a rather cruel 'trump card' that could be used as a comprehensive defence against any allegation (...) of genocide (...)").

[62]ICTY, Prosecutor v. Radislav Krstić, Trial Chamber, Judgment, 2 August 2001, Case No. IT-98- 33, par. 574.

racial or religious group. Persecution presents the application of respect to genocide, of the objective element which includes the destruction of cultural heritage, as well as the taxable person which includes a group and a discriminating community for cultural reasons as well:

"(…) where there is physical or biological destruction there are often simultaneous attacks on cultural and religious property and symbols targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group (…)" (Liakopoulos, 2019; Ambos, 2022).

In the Krstić case and then in the ICJ was affirmed:

"(...) that the elimination of traces of a cultural or religious group (...) may be contrary to other legal norms (...) and does not fall within the material acts integrating genocide in accordance with the customary definition codified by art. 2 of the 1948 Convention (…) (Lingaas, 2016)"[63].

Position that was followed also by the ICTY in the Stakić case: "(...) that it is necessary (...) to positively identify the link between the attacked goods and the target group (...)"[64]. The evidence attributed to cultural genocide is not the enforcement of existing international obligations to protect cultural heritage and seems consistent with the centric approach that international courts are operating in the field of human rights, privileged in the matter.

International criminal jurisprudence considers cultural genocide (Behrens, Henham, 2013) as a crime that includes iconoclastic destruction and integrates a violation of human rights. The

[63]ICJ, Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), op. cit., par. 194.

[64]ICTY, Prosecutor v. Stakić, Appeals Chamber, Judgment, op. cit., par. 24.

repression of the genocide: "(…) would have the effect to ensure the continuing contribution of each group to the cultural heritage of all humanity (…)" (Vrdoljak, 2011).

It is understood that the destroyer of cultural heritage with concrete testimonies does not take the form of persecution. This limitation, if we can call it that of cultural genocide, once the evidence assigned to it is found, demonstrates a correlation between the destruction of the property and the protected groups (national, ethnic, religious or racial) despite not including the cultural group (Cassese, Acquaviva, Fan, Whiting, 2011)[65]. The criminalization of the destruction of cultural art during the period of peace is reached by a regulatory framework and the jurisprudential provisions are grafted on the point of cultural genocide (Robinson, 1965-1966; Simon, 1996-1997; Nersessian, 2007; Lingaas, 2016).

The cultural destruction of a group includes not only the prohibition: "(...) of the use of a language or the systematic destruction of books that were written in that language or that refer to the religious rituals of the group, but also:

"(…) the systematic destruction of historical or religious monuments or their diversion to alien uses, or destruction or dispersion of documents or objects of historical, artistic, or religious interest and of religious accessories (…)" (Mascagni, 2011).

[65]ICTY, Prosecutor v. Krstić, Trial Chamber, Judgment, cit., par. 559 ss. ICTR, Prosecutor v. Kayishema and Ruzindana, Trial Chamber II, Judgment, ICTR-95-1-T, 21 May 1999, par. 98; Prosecutor v. Akayesu, Trial Chamber I, Judgment, ICTR-96-4-T, 2 September 1998, par. 513.

Concluding remarks

We can understand that cultural heritage is illegally targeted by each warring party. We are talking about behavior accompanied by acts of physical violence. Actions that were punished as war crimes, crimes against humanity that are combined with physical and cultural damage that even amounts to genocide. The destruction of monuments and historical events, the destruction of material heritage, movable and immovable, as well as the persecution of groups is considered an attempt to break away from the violation of human cultural rights. The tangible heritage is linked to its material form which is linked to human occupation. The courtly form of inheritance and its destruction is considered a violation of customary and contractual rights as can be seen from the decisions of international courts.

The existence of a multitude of treaties protecting cultural heritage in practice provide an unclear framework with the result that non-compliance with the rules allows a system of law enforcement where in times of war the insult to cultural heritage works effectively in the wake of the wars we saw in the former Yugoslavia. Each State chooses to interpret international law in its own way. The problem of insulting the cultural heritage is magnified in a conflict where the cases involving active state actors interpret different concepts such as heritage and protection. International criminal courts have played an

important role in creating justice for the destruction of heritage as well as individual responsibility.

The military practice until today has shown that the above rules exist, but to what extent they are applied remains an object of study and research. The close cooperation of the state forces, the blue-collar forces and the military forces operating within the framework of an alliance is more imperative to understand what cultural heritage means, who we are fighting and who is our real enemy. Every soldier should be familiar with the issues of cultural heritage protection. Cooperation during the period of an armed conflict should not be followed by cooperation of experts on one of the sides involved. In a post-conflict context and through cooperation it is crucial to develop a cultural awareness as well as in the case of missions listening to the local culture, the monuments in each place and the restoration of the dams must remain far from war goals, revenge and war strategies.

We have too many States, conventions for the protection of cultural heritage and we probably don't need any more than it has entered the international statutes as a crime against humanity and war. We need a “special education” of those involved in this kind of war tactics and no. The time is more ripe as international law has shown that international criminal responsibility is more the practice of international courts and the participants in such acts of destruction do not remain unpunished nor protagonists of

the right of the strongest. The culture of Nuremberg is very far from the current practice of States and international criminal law.

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